No. 08-1375

FILED
JUN 8 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, and DR. SAUL MARGULES,

Petitioners,

v.

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, and SCOTT WAY

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE MICHIGAN CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

THE DECISION OF THE COURT OF APPEALS CANNOT BE RECONCILED WITH THIS COURT'S MCCARRAN-FERGUSON ACT PRECEDENTS AND WILL HAVE SIGNIFICANT, ADVERSE CONSEQUENCES TO COUNTLESS EMPLOYERS SUBJECT TO WORKER'S COMPENSATION CLAIMS 7

A. Absent Review By This Court, State Worker's Compensation Systems Will Be Overrun By Civil RICO Lawsuits 7

B. The Decision Below Is Wrong And Conflicts With The Decisions Of This Court 15

1. The decision below, by narrowly interpreting "business of insurance," conflicts with decisions of this Court and the Seventh Circuit 16

2. The Sixth Circuit's ruling that civil RICO actions do not impair state law under the McCarran-Ferguson Act is wrong 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES:

Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996) 20

Clark v. United Technologies Automotive, Inc., 594 N.W.2d 447 (Mich. 1999) 23

Cole v. Dow Chemical Co., 315 N.W.2d 565 (Mich. App. 1982) 24

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 15

FMC Corp. v. Holliday, 498 U.S. 52 (1990) 21

Harris v. Vernier, 617 N.W.2d 764 (Mich. Ct. App. 2000) 24

Humana Inc. v. Forsyth, 525 U.S. 299 (1999) 22, 23, 24

Kentucky Association of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003) 6, 21

Lovilia Coal Co. v. Williams, 143 F.3d 317 (7th Cir. 1998) 20

Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985) 19

New York Central Railroad Co. v. White, 243 U.S. 188 (1917) 9, 10

Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946) 8, 25

SEC v. National Securities, Inc., 393 U.S. 453 (1969) 6, 7, 16

TABLE OF AUTHORITIES

Page

Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119 (1982) 17

United States Department of Treasury v. Fabe, 508 U.S. 491 (1993) 19

UNUM Life Insurance Co. of America v. Ward, 526 U.S. 358 (1999) 19

FEDERAL STATUTES & RULES:

15 U.S.C. § 1011 8

15 U.S.C. § 1012 4

15 U.S.C. § 1012(b) 8

Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.:

§§ 1961-1968 1

§ 1964(c) 13

28 U.S.C. § 1445(c) 13

29 U.S.C. § 1144(b)(2)(A) 21

30 U.S.C. § 933(a) 20

30 U.S.C. § 933(b) 20

Fed. R. Civ. P. 23(f) 15

STATE STATUTES, LAWS, & CODES:

Cal. Lab. Code:

§ 3601 22

§ 3601(a) 10

TABLE OF AUTHORITIES

Page

§ 3700 12

§ 5300 19

Fla. Stat.:

§ 440.09 18

§ 440.12 18

§§ 440.14-440.16 18

§ 440.20 11

Ind. Code Ann. § 22-3-2-6 ..... 10, 22

Mass. Gen. Laws ch. 152, § 13 11

Michigan Worker's Disability Compensation Act (WDCA), Mich. Comp. Laws:

§§ 418.101-418.941 6

§ 418.131 ..... 10, 22

§ 418.131(1) 23, 24

§ 418.161 18

§ 418.301(1) 18

§ 418.301(5) 18

§ 418.321 18

§ 418.381(1) 18

§ 418.611 12

§ 418.611(1)(a) 12, 7

§ 418.611(1)(b) 17

§ 418.621(4) 18

TABLE OF AUTHORITIES

Page

§ 418.631(1) 23

§ 418.631(2) 23

§ 418.801 ..... 11, 19

§ 418.801(2) 23

§ 418.841(1) 24

§ 418.847 19

Minn. Stat. § 176.181 12

Mo. Rev. Stat.:

§ 287.110 18

§§ 287.130-287.250 18

§ 287.300 18

§ 287.310 18

Ohio Rev. Code Ann. § 4123.51 19

OTHER AUTHORITIES:

Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 Ga. L. Rev. 775 (1982) 9

P. Blake Keating, *Historical Origins of Workmen's Compensation Laws in the United States: Implementing the European Social Insurance Idea*, 11 Kan. J. L. & Pub. Pol'y 279 (2002) 9, 10

Lex K. Larson, *Larson's Workers' Compensation Law* (2009) 8, 10

TABLE OF AUTHORITIES

Page

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Edward M. Welch & Daryl C. Royal, *Worker's Compensation in Michigan: Law & Practice* (5th ed. Supp. 2009) 9, 12

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE MICHIGAN CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America and the Michigan Chamber of Commerce respectfully submit this brief as *amici curiae* in support of petitioners.[1]

INTEREST OF *AMICI CURIAE*

The issue presented by the petition for a writ of *certiorari*—whether the McCarran-Ferguson Act precludes disappointed worker's compensation insurance claimants from potentially transforming (and re-litigating) every worker's compensation claim into a civil Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, action—is of profound importance to every employer subject to state worker's compensation laws within the Sixth Circuit. Thousands of *amici curiae*'s members

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[1] Pursuant to Rule 37.2(a), letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, and counsel for *amici curiae* timely notified each party's counsel ten days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

are subject to the court of appeals' ruling, which will impair the exclusive remedy provisions of worker's compensation laws in numerous States and undermine the ability of employers to insure against on-the-job employee injuries. *Amici curiae* are well situated to assist the Court in understanding the enormous practical importance of the McCarran-Ferguson Act and RICO issue that this case presents.

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Organized 50 years ago, the Michigan Chamber of Commerce has become the strongest advocate and voice for business in the State of Michigan. With more than 7,000 member firms, the Michigan Chamber is one of the largest state chambers of commerce in the Nation. The Michigan Chamber operates state and federal political action committees that help keep its members' interests front and center for lawmakers at all levels. Relevant here, the Michigan Chamber was in the forefront of the reform of Michigan's worker's compensation laws in the 1980s.

In the instant case, plaintiffs seek to expand RICO into an area of the law explicitly reserved by Congress for the States. The court of appeals held that a RICO action could be brought against an employer and a claims-handling company for alleged wrongful processing of worker's compensation claims. That decision subverts the purpose and language of the McCarran-Ferguson Act, which broadly precludes application of federal law that would impair state laws, such as worker's compensation laws, that were enacted for the purpose of regulating the business of insurance. The proposed expansion of RICO's civil remedies to dissatisfied worker's compensation claimants must yield to the McCarran-Ferguson Act's reverse preemption.

The effect of this ruling on *amici*'s members, if not reviewed by this Court, will be staggering. States have created worker's compensation schemes throughout the Nation that set aside employees' rights to bring tort actions in exchange for no-fault systems that, through worker's compensation insurance, pay out $50 billion worth in benefits annually to cover employee personal injuries arising out of and in the course of employment.

Amici thus have a strong interest in the Court correctly interpreting the McCarran-Ferguson Act and reversing the decision below so that state law worker's compensation schemes are not overrun by a proliferation of civil RICO actions.

SUMMARY OF ARGUMENT

Congress enacted the McCarran-Ferguson Act to broadly protect state laws enacted for the purpose of regulating the business of insurance from undue federal interference, except where Congress enacted a law specifically relating to the business of insurance. 15 U.S.C. § 1012. State worker's compensation programs are precisely the type of state insurance program Congress sought to shield from burdensome federal intrusion. But by permitting disappointed worker's compensation claimants to re-litigate the handling (including the claims handling) of their worker's compensation claims in civil RICO actions in federal court, the decision below subverts the core purpose underlying worker's compensation laws and opens a potential floodgate of federal lawsuits, including class actions, against *amici*'s members whenever a state worker's compensation agency denies a claim.

A. Worker's compensation replaces the traditional tort system with a form of social insurance whereby employers—such as *amici*'s members—bear the economic costs of injuries—more than $50 billion annually—without regard to fault. Workers need not prove negligence on the part of their employers, nor are traditional affirmative defenses available to employers. In exchange, employers are relieved from the burdens of personal injury suits and ensured that limited, standardized worker's compensation benefits are the exclusive remedies available for workplace injuries.

From inception, worker's compensation schemes have been undergird by insurance, which facilitates the spreading of the risk of workplace injuries. In nearly every State, including Michigan, worker's compensation is funded through a system of private insurance that is regulated by the States.

The ruling below, if left undisturbed, will undermine States' worker's compensation systems by permitting unsatisfied worker's compensation claimants to bring civil RICO actions whenever they contend they have not received all the benefits they believe they are due, something Congress not only never intended but explicitly sought to prevent. Multiplied throughout the Nation, the effect of the Sixth Circuit's rationale will be profound, as over $50 billion of benefits are paid out by state worker's compensation systems annually, with over $5.3 billion of that total originating from States within the Sixth Circuit alone. The prospect of RICO actions by worker's compensation claimants will fundamentally alter how employers and worker's compensation insurance companies must address potential worker's compensation losses and the premiums to insure against those losses.

B. 1. Under the McCarran-Ferguson Act, any state law enacted for the purpose of regulating the business of insurance "reverse preempts" federal law that would invalidate, impair, or supersede that state law. The decision below, concluding that the Michigan

Worker's Disability Compensation Act (WDCA), Mich. Comp. Laws §§ 418.101-418.941, does not regulate the "business of insurance," cannot be reconciled with the precedents of this Court and of the Seventh Circuit.

This Court has described "the core of the 'business of insurance'" as "[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement." *SEC v. National Secs., Inc.*, 393 U.S. 453, 460 (1969). Just like almost every other State where *amici*'s members conduct business, the WDCA regulates the business of insurance by (1) mandating that Michigan employers purchase a worker's compensation insurance policy from an insurance carrier authorized to transact the business of worker's compensation insurance; (2) dictating what coverage the insurance policy must provide and specifying key terms of the policy; and (3) regulating the insurance carrier's claims processing.

It makes no difference to this case that the employer, petitioner Cassens, self-insures rather than purchasing a worker's compensation insurance policy (an arrangement that is common in many worker's compensation systems throughout the Nation). This Court has held that self-insurance plans, by engaging in the same risk pooling arrangements as insurance procured from a third party, constitute the business of insurance. *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 336 n.1 (2003).

2. The ruling below was also wrong in its conclusion that civil RICO actions would not invalidate, impair, or supersede the WDCA. The WDCA, like nearly every other worker's compensation regime, provides the exclusive remedy for workers injured during the course of their employment and provides a specific remedy for the wrongful denial of benefits. RICO actions seeking recovery of worker's compensation benefits as well as treble damages and attorney's fees would frustrate the "exclusive remedy" provisions of worker's compensation laws. Moreover, RICO actions would interfere with the State's administrative regime for adjudicating entitlement to worker's compensation because federal courts would have to determine such entitlement as a threshold matter in the RICO actions.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS CANNOT BE RECONCILED WITH THIS COURT'S MCCARRAN-FERGUSON ACT PRECEDENTS AND WILL HAVE SIGNIFICANT, ADVERSE CONSEQUENCES TO COUNTLESS EMPLOYERS SUBJECT TO WORKER'S COMPENSATION CLAIMS

A. Absent Review By This Court, State Worker's Compensation Systems Will Be Overrun By Civil RICO Lawsuits

1. Congress enacted the McCarran-Ferguson Act "*broadly* to give support to the existing and future state systems for regulating * * * the business of insurance." *SEC v. National Secs., Inc.*, 393 U.S. 453,

458 (1969) (emphasis added) (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946)); *see also* 15 U.S.C. § 1011. To that end, the McCarran-Ferguson Act precludes the application of any federal statute that would "invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

Worker's compensation statutes are precisely the type of state law that Congress sought to protect with the McCarran-Ferguson Act. Worker's compensation is a no-fault system designed to provide an exclusive remedy to workers for personal injuries arising out of and in the course of their employment. Worker's compensation covers a staggering number of employees; approximately ninety-seven percent of all workers covered by state unemployment programs are also covered by worker's compensation. Terry Thomason *et al.*, *Workers' Compensation: Benefits, Costs, and Safety under Alternative Insurance Arrangements* 6 (2001); *see also* 1 Lex K. Larson, *Larson's Workers' Compensation Law* § 2.08 (2009) (noting that approximately ninety percent of all workers are covered). All told, more than $50 billion in worker's compensation benefits are paid out pursuant to state worker's compensation programs annually. National Academy of Social Insurance, *Workers' Compensation: Benefits, Coverage, and Costs, 2006*, at 19 (Aug. 2008), *available at* http://www.nasi.org/usr_doc/nasi_workers_comp_report_2006.pdf.

Worker's compensation replaces the traditional state law tort system with a form of social insurance. Around the turn of the twentieth century, States concluded that industry, rather than individual workers, should bear the economic costs of workplace injuries. This was a reflection of the fact that "industrial accidents were not only more common, but were almost entirely fortuitous." P. Blake Keating, *Historical Origins of Workmen's Compensation Laws in the United States: Implementing the European Social Insurance Idea*, 11 Kan. J. L. & Pub. Pol'y 279, 279 (2002).

Workers thus were relieved of the difficult obligation of proving negligence on the part of their employers and of defeating three difficult-to-overcome employer defenses at common law: (1) the fellow-servant rule, which precluded employer liability for injuries caused by a fellow worker's negligence; (2) assumption of the risk, whereby the worker assumed the risk of inherent job dangers; and (3) contributory negligence, which barred the employee's recovery if he or she was negligent in any way. *New York Cent. R.R. Co. v. White*, 243 U.S. 188, 198-200 (1917); Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 Ga. L. Rev. 775, 776 (1982); Edward M. Welch & Daryl C. Royal, *Worker's Compensation in Michigan: Law & Practice* § 1.2 at 1-3 (5th ed. Supp. 2009). Before worker's compensation, workers prevailed in fewer than twenty percent of suits over industrial

accidents. Larson, *supra*, § 2.05; *see also* Thomason, *supra*, at 5.

Employers, for their part, were freed from the costs and uncertainty of personal injury suits. Worker's compensation benefits were made the exclusive remedy for injured employees, and they were standardized, with a fixed scale of benefits for each type of injury. *See, e.g.*, Keating, *supra*, at 300; Cal. Lab. Code § 3601(a); Mich. Comp. Laws § 418.131; Ind. Code Ann. § 22-3-2-6. Injured workers thus became entitled only to certain wage loss benefits, medical treatment, and rehabilitation services.

2. From worker's compensation's earliest origins, the use of insurance has been at the core of securing the payment of its benefits.[2] *New York Cent. R.R.*, 243 U.S. at 194 (noting that, for one of the first worker's compensation laws upheld against constitutional challenge, "[a] fund is created, known

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[2] The rise of worker's compensation was concomitant with the development of insurance for losses generally. As workers became dependent on wages and steady employment, they sought to protect their families from potential economic misfortune, and "life insurance appeared in England and Scotland [in] the eighteenth century." Keating, *supra*, at 299. "Efforts to begin life insurance companies in America were not successful until the 1840s, but because of the useful service insurance provided by sharing risks, insurance grew rapidly in America and was used to diversify risks of loss other than those of death. Health and accident insurance, liability insurance, and workmen's compensation would all grow to take an important place in the U.S. economy." *Ibid.*

as 'the state insurance fund,' for the purpose of insuring employers against liability under the law, and assuring to the persons entitled the compensation thereby provided"); *see also* Thomason, *supra*, at 34 ("From its origin (in most states) between 1910 and 1920, workers' compensation has relied on a mixture of state funds, private carriers, and self-insurance * * * ."). By providing predictability and manageability to employers' costs, worker's compensation made the risk associated with workplace injuries "insurable * * * to curtail the delays and expenses of lawsuits." Thomason, *supra*, at 5. Insurance thus facilitates the manner in which the costs of the worker's compensation system are spread across the public at large.

Early debate in the States ensued over whether worker's compensation should be funded through private insurance or through state funds—*e.g.*, state-funded insurance programs. *Id.* at 139. Ultimately, the private insurance industry won the debate in most States. *Ibid.*[3] And as part of the worker's compensation statutory schemes, States regulate worker's compensation insurance to ensure that claims would be properly processed and benefits would be timely paid. *See, e.g.*, Mich. Comp. Laws § 418.801; Fla. Stat. § 440.20; Mass. Gen. Laws ch. 152, § 13.

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[3] Most benefits now are paid by private insurance. *See* National Academy of Social Insurance, *Workers' Compensation*, *supra*, at 13.

Accordingly, some form of insurance is an essential element of every State's worker's compensation system today, and Michigan is no exception. Indeed, in Michigan, every employer subject to worker's compensation is required either to purchase insurance or to obtain approval as a self-insured employer. Mich. Comp. Laws § 418.611. And even those employers that are permitted to self insure are almost always required to purchase excess insurance to cover against significant losses. *Id.* § 418.611(1)(a); Welch, *supra*, § 2.16 ("Almost all self-insured employers purchase specific excess insurance," under which "an insurance company agrees to pay the losses for a specific occurrence if they exceed a certain amount."). Other States are no different. *See, e.g.*, Cal. Lab. Code § 3700; Minn. Stat. § 176.181, subd. 2(a).

3. There can be no dispute that the ruling below will significantly and adversely undermine worker's compensation programs to which *amici*'s members are subject. The court of appeal's decision permits disappointed worker's compensation claimants to bring civil RICO actions whenever they receive fewer benefits than they believe they are due.

In the instant case, plaintiffs are all current or former employees of petitioner "Cassens who have submitted worker's compensation claims to Cassens based on workplace injuries they have each sustained." Pet. App. 3a. These plaintiffs contend that petitioners "deliberately selected and paid unqualified doctors * * * to give fraudulent medical opinions that would support the denial of worker's compensation benefits,

and that [petitioners] ignored other medical evidence in denying them benefits." *Ibid.* Plaintiffs thus seek only the very same benefits they claim were wrongfully withheld (trebled under 18 U.S.C. § 1964(c)) and allege no other independent injury. Accordingly, plaintiffs' civil RICO action is nothing more than an attempt to re-litigate worker's compensation claims that a state agency already denied.

Absent this Court's intervention, the Sixth Circuit's ruling will permit federal courts to sit in review of state agency worker's compensation proceedings—something Congress explicitly sought to preclude, *see* 28 U.S.C. § 1445(c) ("A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States."). And federal courts within the Sixth Circuit will be permitted to oversee the payout of the $5.3 billion of worker's compensation benefits disbursed annually in States within the Sixth Circuit by private insurers, state-funded insurance programs, and self insurers. National Academy of Social Insurance, *Workers' Compensation*, *supra*, at 18-19. Under the ruling below, even claimants that have already been *awarded* benefits can claim disappointment and bring civil RICO actions claiming that some alleged fraud prevented them from getting more.

This result, which permits re-litigation of claims, undermines the closed nature of state worker's compensation by providing an alternative avenue for workers to seek relief with the additional availability

of treble damages and attorney's fees. Moreover, such actions could impose unforeseen losses for worker's compensation insurers. This might cause insurers to raise premiums or, if they cannot due to state regulation, to abandon the market altogether. Thomason, *supra*, at 170.

By no means are these concerns inchoate. In the few months that have followed the decision below, civil RICO class actions have already been filed against *amici*'s members. Some of the Nation's most important businesses, such as United Parcel Service, Coca-Cola Enterprises, and DHL, already have been sued or threatened with suit by employees claiming RICO violations based upon wrongfully denied worker's compensation benefits. *See, e.g.*, *Lewis v. Drouillard*, No. 2:09-cv-11059 (E.D. Mich. filed Mar. 30, 2009); *Jackson v. Segwick Claims Mgmt. Servs., Inc.*, No. 2:09-cv-11529 (E.D. Mich. filed Apr. 23, 2009). This is just the beginning. The availability of treble damages and attorney's fees provides significant incentive for other disappointed worker's compensation claimants to bring more RICO class actions against *amici*'s members.

Nor should the Court allow this issue to percolate. This Court will have limited opportunity to review the issues raised by the decision below in the future. While the instant case was filed by individual plaintiffs, every subsequent case that has been filed under this worker's compensation-RICO theory is a putative class action. As the Court has recognized, when RICO cases are certified as class actions, the

threat of class-wide damages, particularly treble damages, creates sometimes insurmountable pressure on businesses to settle out of court rather than face potentially staggering liability, substantial litigation expenses, and the attendant risk of being associated with a federal lawsuit claiming "racketeering." *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Although Rule 23(f) of the Federal Rules of Civil Procedure provides a possible avenue to interlocutory review of class certification, such petitions are rarely granted by courts of appeals. Thus, RICO class actions, such as the cases that will follow this one, are rarely litigated to the point that would enable this Court's review, and therefore this Court should address these issues in this case now.

B. The Decision Below Is Wrong And Conflicts With The Decisions Of This Court

In deciding that the McCarran-Ferguson Act does not preempt civil RICO claims for alleged fraud in the processing of worker's compensation benefit claims, the court of appeals struggled with the question whether worker's compensation laws, like the Michigan WDCA, regulate the business of insurance. But that question is not a close one. A straightforward, routine application of this Court's precedents yields the conclusion that the WDCA regulates the business of insurance.

1. The decision below, by narrowly interpreting "business of insurance," conflicts with decisions of this Court and the Seventh Circuit

a. The decision below, although acknowledging that "[t]here are several provisions of the WDCA that directly relate to the terms of the insurance contract and thus to 'the business of insurance,'" Pet. App. 23a, held nonetheless that the WDCA was not enacted for the purpose of regulating the business of insurance. That decision conflicts with precedents of this Court and the Seventh Circuit.

This Court has described "the core of the 'business of insurance'" under the McCarran-Ferguson Act as "[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement." *SEC v. National Secs., Inc.*, 393 U.S. 453, 460 (1969). "Statutes aimed at protecting or regulating" the "relationship between the insurance company and the policyholder," "are laws regulating the 'business of insurance.'" *Ibid.*

Determining whether a particular practice is part of the business of insurance is guided by three factors: (1) whether the practice "has the effect of transferring or spreading a policyholder's risk"; (2) whether it is "an integral part of the policy relationship between the insurer and the insured"; and (3) whether the practice "is limited to entities

within the insurance industry." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982).

Even the most straightforward examination of the WDCA demonstrates that all three factors are present. The WDCA, broadly speaking, can be viewed as imposing three key requirements. First, the WDCA mandates Michigan employers to purchase an insurance contract from an insurance carrier that is "authorized to transact the *business of worker's compensation insurance* within this state." Mich. Comp. Laws § 418.611(1)(b) (emphasis added). Alternatively, employers may self-insure only after receiving state authorization upon a showing of ability to pay worker's compensation claims. *Id.* § 418.611(1)(a). Thus, the court of appeals' statement that "[t]here is no contract in the worker's compensation scheme," Pet. App. 19a, is fundamentally wrong. The WDCA—like other state worker's compensation statutes, *see* page 12 *supra*—mandates an insurance contract between employers and insurers to cover employees' workplace injuries.[4]

Second, the WDCA, like other States' statutes, dictates what coverage the worker's compensation

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[4] As the petition discusses, even where the employer self insures, the employer takes on the role of insurance provider, and Michigan law treats worker's compensation coverage as part of the contract between employer and employee. Pet. 14 (collecting cases). More significantly, even employers that self insure are often required to have excess insurance policies. *See* Mich. Comp. Laws § 418.611(1)(a).

insurance policy must provide. *See, e.g.*, Fla. Stat. §§ 440.09, 440.12, 440.14-440.16; Mo. Rev. Stat. §§ 287.110, 287.130-287.250, 287.300, 287.310. It specifies which employees must be covered by the policy. *See* Mich. Comp. Laws § 418.161. It spells out exactly what claims the insurance policy must pay: employees' "personal injur[ies] arising out of and in the course of employment by an employer who is subject to this act." *Id.* § 418.301(1). And it determines the type and amount of insurance benefits that the policy must pay for each claim. *See, e.g.*, *id.* § 418.301(5) (computation of disability benefits); *id.* § 418.321 (compensation for death resulting from personal injury). Thus, the WDCA prescribes nearly all the key terms of the insurance contract between the employer and carrier.

In fact, as the court of appeals recognized, Pet. App. 23a, the WDCA dictates actual policy language that must appear in "each policy of insurance covering worker's compensation in this state." *Id.* § 418.621(4). Every such policy must contain provisions titled "Compensation," "Medical services," "Rehabilitation services," "Funeral expenses," "Scope of contract," "Obligations assumed," "Termination notice," and "Conflicting provisions," and the text that must appear in each policy under these headings is also provided. *Ibid.*

And third, the WDCA regulates the insurance company's claims processing. It requires employees to give notice of a workplace injury within ninety days and to file a claim within two years. *Id.* § 418.381(1).

And it mandates that the insurance carrier pay benefits within fourteen days after receiving notice of an injury (absent a dispute), imposes penalties for late payment, and requires recordkeeping of payments made. *Id.* § 418.801. The WDCA also provides for a process to resolve disputes over claims, either through mediation or through adjudication by the Michigan Workers' Compensation Agency. *Id.* § 418.847. Other States impose similar requirements. *See, e.g.*, Cal. Lab. Code § 5300; Ohio Rev. Code Ann. § 4123.51.

This Court has held that such state regulation of insurance coverage goes to the core of the business of insurance. By mandating coverage and provisions of worker's compensation insurance policies, the WDCA "prescrib[es] the terms of the insurance contract," and "directly regulate[s] the 'business of insurance.'" *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 502-503 (1993). *See also UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 374-375 (1999) (state law mandating insurance contract terms regulates business of insurance); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 742-743 (1985) (mandated-benefit laws regulate the business of insurance). And by regulating the processing of worker's compensation claims, the WDCA regulates "the actual performance of an insurance contract," which this Court has held "falls within the 'business of insurance.'" *Fabe*, 508 U.S. at 503.

b. The decision below held that worker's compensation regimes *per se* do not regulate the

business of insurance (even where the employer purchases an insurance policy rather than self-insures). Pet. App. 19a-22a. But that cannot be reconciled with the Seventh Circuit's decision in *Lovilia Coal Co. v. Williams*, 143 F.3d 317 (7th Cir. 1998). The court in that case examined a very similar scheme in the Black Lung Benefits Act (BLBA) and held that the BLBA specifically relates to the "business of insurance."[5] Like the WDCA, the BLBA mandates the purchase of worker's compensation insurance policies; the BLBA requires coal mine operators in certain States to either purchase a worker's compensation insurance policy or demonstrate their ability to self insure. *Id.* at 319-320; 30 U.S.C. § 933(a). Also like the WDCA, the BLBA dictates certain coverage and terms that must be provided in the insurance policies. 30 U.S.C. § 933(b). Applying the three McCarran-Ferguson factors, the *Lovilia Coal* court concluded that the BLBA specifically relates to the business of insurance because (1) it spreads the coal mine operators' risk of paying black lung claims among all coal mine policyholders; (2) it is an integral part of the policy relationship between employer and carrier, specifically directing carriers

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[5] The issue in *Lovilia Coal* was whether the federal BLBA came within the McCarran-Ferguson Act's exemption from "reverse preemption" as an act of Congress that specifically relates to the business of insurance. The three *Pireno* factors for determining whether a law regulates the "business of insurance" apply equally in this context. *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 39 (1996).

how to structure their contracts; and (3) it is aimed solely at insurance policyholders and carriers.

c. The court below offered an alternative basis for its decision: that self-insurance is not the business of insurance. But that holding also is in direct conflict with this Court's precedent.

This Court has directly addressed the question whether self-insurance constitutes insurance. In the context of ERISA's savings clause, which saves from preemption state law "which regulates insurance," 29 U.S.C. § 1144(b)(2)(A), this Court has held that the clause applies to both self-insured and insured ERISA plans, because "self-insured plans engage in the same sort of risk pooling arrangements as separate entities that provide insurance to an employee benefit plan." *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 336 n.1 (2003); *see also FMC Corp. v. Holliday*, 498 U.S. 52, 54, 60-61 (1990) (holding that state law regulating self-insured plan falls within ERISA's insurance savings clause).

The decision below equates being self-insured with being uninsured. But that is wrong. An employer can self-insure only after demonstrating the financial wherewithal to pay worker's compensation insurance benefits, just as insurance carriers must demonstrate ability to pay to be authorized as a worker's compensation insurance provider. And a self-insured employer is subject to the same insurance regulations that apply to insurance carriers. Moreover, it is illogical to think that Congress, in enacting the

McCarran-Ferguson Act, would have wanted to preserve States' ability to regulate insurance carriers but not preserve their ability to regulate employers who take on the role of insurer by self-insuring.

2. The Sixth Circuit's ruling that civil RICO actions do not impair state law under the McCarran-Ferguson Act is wrong

The decision below also was wrong in its conclusion that civil RICO actions would not invalidate, impair, or supersede the WDCA. Civil RICO actions would provide treble damages and attorney's fees for the wrongful denial of worker's compensation benefits. That would impair the WDCA's "exclusive remedy" provisions in Michigan, *see* Mich. Comp. Laws § 418.131, and almost every other state, *see, e.g.*, Cal. Lab. Code § 3601; Ind. Code Ann. § 22-3-2-6, which preclude employees' recovery of damages under other law for an injury that is covered under worker's compensation. Accordingly, civil RICO actions in cases alleging wrongful denial of worker's compensation benefits are barred under the McCarran-Ferguson Act.

The McCarran-Ferguson Act does not give "a green light for federal regulation whenever the federal law does not collide head on with state regulation." *Humana Inc. v. Forsyth*, 525 U.S. 299, 309 (1999). Instead, a federal law that would "frustrate any declared state policy or interfere with a State's administrative regime" is held to "impair" the

state regulation and is precluded. *Id.* at 310. Civil RICO actions for the wrongful denial of worker's compensation benefits do both.

As the Sixth Circuit recognized, Pet. App. 25a-26a, the WDCA provides remedies for the wrongful denial of worker's compensation benefits. Any insurance carrier that "repeatedly or unreasonably fails to pay promptly claims for compensation for which it shall become liable" is subject to having its license revoked, Mich. Comp. Laws § 418.631(1), and any self-insured employer that does so is subject to losing its self-insured status, *id.* § 418.631(2). And the WDCA imposes a penalty of fifty dollars per day for each day over thirty that benefits are unpaid after they become due. *Id.* § 418.801(2). Relying on *Humana*, the decision below held that those remedy provisions of the WDCA are not impaired by the additional remedies provided under RICO.

But the court of appeals went astray by not even considering whether RICO would impair the WDCA's "exclusive remedy" provision. That provision specifies that with the exception of intentional torts, "[t]he right to the recovery of benefits" under the WDCA is "the employee's exclusive remedy against the employer for a personal injury or occupational disease." Mich. Comp. Laws § 418.131(1). The provision ensures the Michigan Legislature's guarantee that employers be protected from tort liability in exchange for a no-fault obligation to pay benefits for workplace injuries. *Clark v. United Techs. Automotive, Inc.*, 594 N.W.2d 447, 450 (Mich. 1999). The statute provides

employers "immunity" from suit. *Harris v. Vernier*, 617 N.W.2d 764, 768-769 (Mich. Ct. App. 2000). If a suit is based upon an injury covered by the WDCA—*viz.*, a personal injury arising out of and in the course of employment—it is barred by the exclusive-remedy provision. *Cole v. Dow Chem. Co.*, 315 N.W.2d 565, 568-569 (Mich. App. 1982).

Respondents' RICO action seeks recovery of the very same worker's compensation benefits that they claim to be entitled to under the WDCA, but with those benefits trebled and with the additional remedy of attorney's fees. But that would "frustrate [the] declared state policy," *Humana*, 525 U.S. at 310, that WDCA's benefits be the respondents' "exclusive remedy," Mich. Comp. Laws § 418.131(1).

Moreover, civil RICO lawsuits would "interfere with [the] State's administrative regime," *Humana*, 525 U.S. at 310, that was established to adjudicate employees' eligibility for worker's compensation benefits. The Michigan Legislature placed the adjudication of entitlement to WDCA benefits exclusively within the purview of the Michigan Workers' Compensation Agency. Mich. Comp. Laws § 418.841(1); *Harris*, 617 N.W.2d at 772. Indeed, Michigan state courts lack subject-matter jurisdiction to hear claims for benefits with regard to workplace injuries. *Harris*, 617 N.W.2d at 770-772. Permitting RICO claims for wrongful denial of worker's compensation benefits in federal court would interfere with Michigan's administrative regime because federal judges and juries would have to determine as

a threshold matter whether the employee was entitled to benefits under WDCA, a matter exclusively within the jurisdiction of the Michigan Workers' Compensation Agency.

The court of appeals' reasoning is not in any way limited to Michigan's worker's compensation scheme. Most States' regimes have provisions making their remedies exclusive and requiring adjudication of disputes in an administrative agency rather than in the courts. Permitting RICO treble damages and attorney's fees would impair the operation of those state worker's compensation schemes in violation of the McCarran-Ferguson Act.

* * *

In the instant case, application of civil RICO to worker's compensation claims will have significant adverse consequences to worker's compensation schemes throughout the Nation. To protect against these consequences, this Court must ensure that RICO's use is stringently analyzed where, as here, Congress has made clear that its purpose, as it was in enacting the McCarran-Ferguson Act, "was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins.*, 328 U.S. at 429.

CONCLUSION

For the reasons set forth above and in the petition for a writ of *certiorari*, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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June 8, 2009